CANADIAN TAX Highlights

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$1.7 Million Civil Damage Award Against the CRA

On March 2, 2018, the BC Supreme Court upheld a claim for malicious prosecution against the CRA and awarded compensatory, aggravated, and punitive damages of about $1.7 million to a BC couple wrongfully charged with tax evasion (*Samaroo*, 2018 BCSC 324). The decision made front-page headlines across Canada. The decision is over 100 pages long, damningly indicts the CRA's conduct of the investigation, and raises questions and concerns about the broader culture and practices in the CRA's Criminal Investigations Division.

Tony and Helen Samaroo, husband and wife, owned a restaurant and nightclub in Nanaimo. The CRA conducted an audit and identified unusual cash deposits in the Samaroos' bank accounts. The CRA suspected that they were underreporting income from the restaurant and that, in particular, they were skimming cash receipts from the overnight shift. The CRA initiated a criminal investigation, led by investigator Keith Kendal, that led to the filing of criminal charges of tax evasion.

The CRA does not conduct criminal prosecutions: it conducts investigations, and if it identifies sufficient evidence of an offence, it delivers a prosecution report to the Public Prosecution Service of Canada (PPSC): the PPSC approves the laying of charges and has carriage of any subsequent prosecution. Kendal had preliminary discussions with the PPSC about the Samaroos, and it advised him of significant evidentiary gaps in his case that would have to be remedied before a prosecution. Kendal was unwilling or unable to remedy these gaps, but instead submitted a final prosecution report to the PPSC with "incomplete and erroneous information" about the evidence. The BCSC said that Kendal, in his final prosecution report, "was well aware of the reliance that would be placed on his investigation and resulting report yet subverted the prosecution by suppressing evidence and attributing evidence to others that he created."

The PPSC sent the prosecution report to Brian Jones, an agent prosecutor—essentially a private practitioner hired by the Crown to prosecute cases on a contract basis. A discussion then ensued between the PPSC and Jones over subsequent steps in the prosecution, but there was no formal review of the case's merits and no actual PPSC approval for the laying of charges. After a lengthy review of how, when, and by whom the charges against the Samaroos were approved, the BCSC ultimately concluded that approval occurred when the CRA's Kendal swore an information—never reviewed by the PPSC or Jones—in support of the charges months after the submission of the prosecution report.

After eight months of criminal proceedings, the Samaroos were acquitted of all charges in provincial court (*Samaroo*, 2011 BCPC 503). Under cross-examination during the criminal trial, Kendal was unable to explain how the Samaroos effected the alleged skimming of revenues, and he admitted that the CRA's case was based largely on assumptions about the nightclub's profitability and the Samaroos' financial resources. Cross-examination exposed significant errors and gaps in Kendal's assumptions. The court found that Mr. Samaroo (who testified at length) was a credible witness, and it eventually agreed that the Crown's case was based on "voodoo accounting" and a net-worth analysis lacking any "hallmarks of reliability."

Notwithstanding the acquittal, the prosecution received front-page newspaper coverage in Nanaimo and, as the BCSC concluded, had wrought "devastation" upon the Samaroo family. The Samaroos' credit rating was "shot," and much business was lost—including former regulars of the nightclub who were RCMP officers and first responders. Mr. Samaroo became withdrawn and lethargic, drinking heavily and resuming smoking; Mrs. Samaroo had a breakdown and took to bed for six months; and the couple later split up. Their daughter withdrew from people and stopped using the Samaroo name.

After their acquittal, the Samaroos sued both the CRA and the agent prosecutor, Jones, for malicious prosecution, a tort with four essential elements: (1) the initiation or continuation of a prosecution, (2) the termination of the prosecution in the plaintiff's favour, (3) the prosecution being undertaken without reasonable and probable cause, and (4) the prosecution being motivated by malice or a primary purpose other than to carry the law into effect. All but the second prong was in dispute.

Concerning the first prong (initiating or continuing a prosecution), the CRA apparently argued that decisions to prosecute are made by the PPSC and thus that the CRA was not a proper party for the Samaroos' suit. The BCSC disagreed: factually, the approval of charges against the Samaroos was ultimately made by Kendal, and legally the tort of malicious prosecution is broad enough to encompass any party "actively instrumental" in the initiation of a prosecution, as Kendal "clearly" had been.

Of the third prong (lack of probable cause for prosecution), the BCSC said that the CRA had advanced its prosecution on the basis of theories and suspicions, not evidence: the CRA apparently lost sight of the fact that what matters in a prosecution is what the Crown can prove, not what it believes. The court concluded that "Kendal knew that he did not have reasonable and probable cause to believe that guilt could be

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proved beyond a reasonable doubt" but "continued to pursue the prosecution based on a theory he knew that he could not prove." The court also said that "there was never an explanation given as to how Ms. Helen Samaroo may have been involved in this alleged scheme of evasion."

Concerning the fourth prong (malice), the BCSC delivered a severe rebuke to Kendal, finding, inter alia, that he "acted deliberately to subvert and abuse his office" and that "[t]he presumption of innocence appeared to be meaningless to him":

> Proof of malice requires proof on a balance of probabilities that in the role of an investigator, Mr. Kendal acted deliberately to subvert and abuse his office. I find that he did so. He did so by suppressing evidence and attributing evidence to witnesses that was not accurate. He had decided from the beginning of his involvement with the Samaroos that they were guilty and set out to prove that was the case even if to do so required a breach of his proper role and responsibilities. He knowingly misstated evidence essential to the proof of the *actus reus* despite being aware of its importance, filed a misleading report knowing it would be relied upon to authorize the prosecution and then having achieved that end swore the Information all in the hope of convicting the plaintiffs. His purpose was improper. I am satisfied that malice has been vicariously established as against the CRA as a result of the conduct of Mr. Kendal.
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> As a witness, I found Mr. Kendal to be argumentative, evasive, inflexible and reluctant to concede what clearly should have been conceded. He wrote the Prosecution Report as an advocate not an investigator. He presented the evidence in a way designed to mislead both the PPSC and Mr. Brian Jones. His clear intent was to see that criminal charges were laid. The presumption of innocence appeared to be meaningless to him.

The BCSC went on to observe that "Mr. Kendal's approach may indicate an unfortunate culture within the CRA." The court expressed particular concern over the CRA's policy of publicizing prosecutions in local media and trumpeting—both internally and in its external communications—the decades of prison time to which taxpayers have been sentenced for tax evasion. The court seemed particularly disgusted by e-mail communications between Kendal and his colleagues in which they "looked forward with unprofessional glee to the plaintiffs' anticipated conviction and sentencing and their resulting ruination."

The court found that the CRA's conduct justified awards not only of compensatory damages (which covered the cost of the Samaroos' criminal defence), but also of aggravated and punitive damages:

> The CRA is tasked with the enforcement of the Canadian tax laws. It is expected to act in good faith and deal with the citizens of Canada fairly and objectively. Its employees are expected to do the same. It has available to it the powers of the State and can, as was the case here, bring criminal charges against individuals and companies.
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> The CRA is vicariously liable for the conduct of Mr. Kendal and its employees. Its conduct in this case was high-handed, reprehensible and malicious. The behaviour of Mr. Kendal respecting the suppressing and misstating of evidence deserves rebuke. It offends this Court's sense of decency and was a marked departure from conduct expected of an individual in Mr. Kendal's position and an agency such as the CRA. . . .
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> The CRA and Mr. Kendal do not acknowledge their wrongdoing or their violation of professional standards. They expressed no apology and were without remorse. Given the opportunity they would pursue the plaintiffs again on the same basis. An award of punitive damages, while governed by the principle of proportionality, must punish the defendants. . . .
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> No amount of punitive damages will cause the CRA financial hardship. At the same time the award must address the purpose of punitive damages and bring home to the CRA and its employees that conduct such as has occurred here is not acceptable.

On the other hand, the court dismissed the claim against Jones on the grounds that his malice was not demonstrated. Although Jones "failed to independently assess the proposed charges in accordance with the obligations of Crown counsel," demonstrated a "casual inattention to exercising his prosecutorial role and responsibilities," and "too readily left control of the prosecution, disclosure and decision making to his client, the CRA," the court held that such conduct does not rise to the level of malice. The court also declined to find fault in the PPSC's controversial practice of using private counsel hired on contract to conduct criminal prosecutions.

The Samaroos' fight with the CRA continues. Following their criminal acquittal, the CRA reassessed the Samaroos for the taxes that they were found not guilty of evading, assessments that they appealed to the TCC. In *Samaroo* (2016 TCC 290), the TCC found that the factual findings in the criminal proceedings demolished many of the CRA's assumptions underlying the reassessments and ordered that, exceptionally, the CRA would present its case first in the TCC trial because of the resultant shift in burden of proof. The TCC trial is yet to be scheduled.

The *Samaroo* decision raises many important issues for future cases (or an eventual appeal). Among these issues are the court's obiter dicta criticizing the appropriateness of the CRA's publicizing the results of its Criminal Investigations Division. Deterrence is a key objective of the CRA's criminal investigation program, and that objective suggests that publicizing prosecutions and convictions (in a factual and professional manner) serves the public interest. Moreover, the court's finding that Kendal—but not Jones—was motivated by malice may raise questions about the legal test for "malice": the related tort of misfeasance in public office has been held to include reckless indifference to the legality of one's actions and to the likelihood of injury through that indifference.

Perhaps most importantly, *Samaroo* further reflects the courts' growing willingness to hold revenue agencies (the CRA and Revenu Québec) civilly liable in tort for destructive behaviour in the exercise of their functions, and to sanction these abuses by awarding punitive damages. Other recent examples include the *Groupe Enico* case (2016 QCCA 76) (see "QCA Upholds Abusive Tax Audit Award," *Canadian Tax Highlights*, March 2016) and *Brochu c. Agence du revenu du Québec* (2018 QCCS 722), decided the week before *Samaroo*. Time will tell whether such awards produce a change in attitude and conduct from Canada's revenue agencies toward the taxpaying public.

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